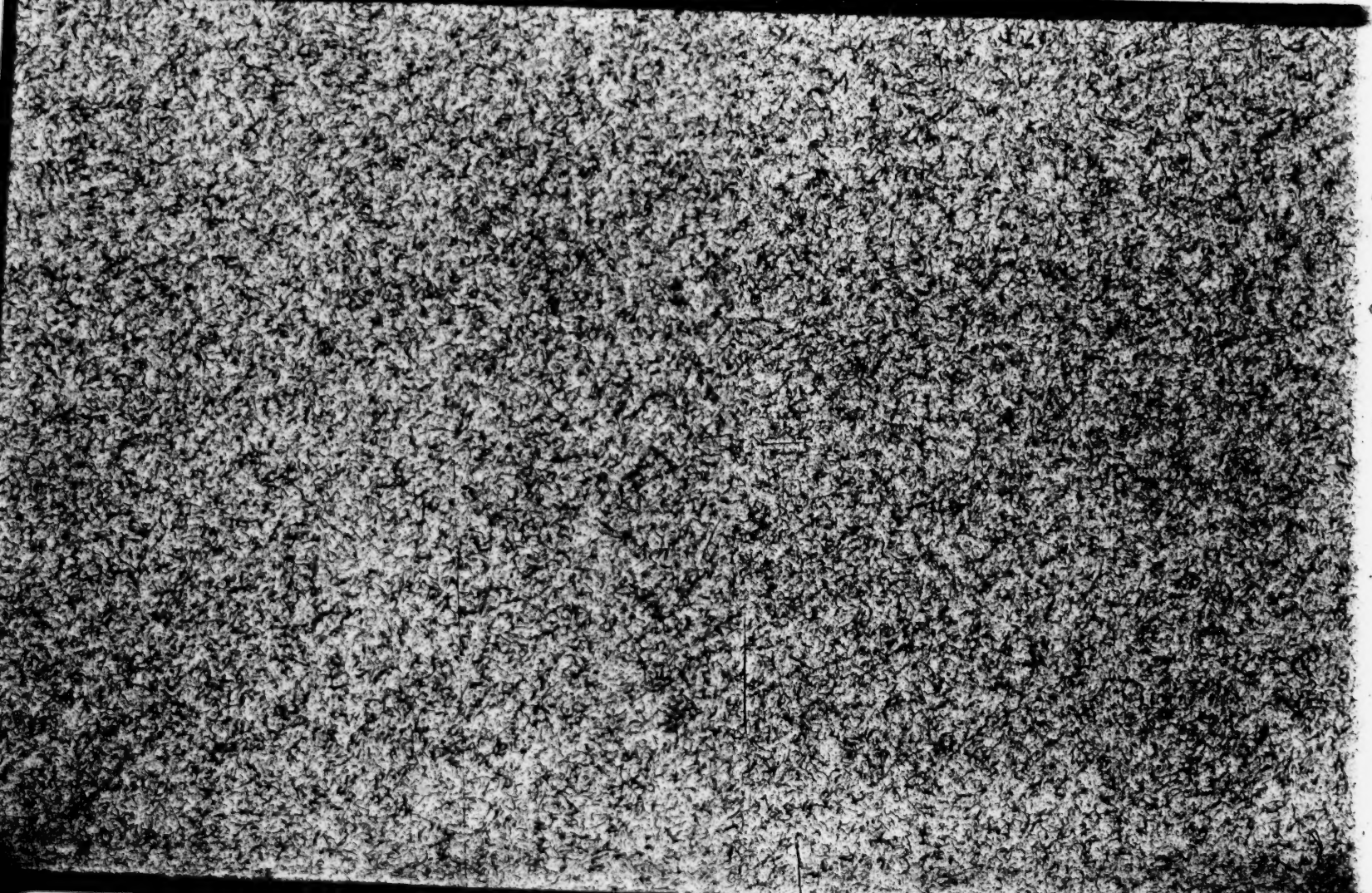

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 422.

UNITED STATES OF AMERICA, ET AL., *Appellants*,

vs.

ILLINOIS CENTRAL R. R. CO., ET AL., *Appellees*.

BRIEF FOR APPELLANT, INLAND WATERWAYS CORPORATION.

CLARK, C. WREN.
Solicitor for Appellant, Inland Waterways Corporation.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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UNITED STATES OF AMERICA, ET AL., *Appellants,*

vs.

ILLINOIS CENTRAL R. R. CO., ET AL., *Appellees.*

BRIEF FOR APPELLANT, INLAND WATERWAYS CORPORATION.

STATEMENT OF THE CASE.

The Statute under attack in this case (Sec. 3 (e), Barge Line Act, Copy attached as Appendix A) affords to Appellees an expedited full hearing by the Interstate Commerce Commission respecting the lawfulness and reasonableness of the Commission's orders under the Statute. The order of the Commission complained of (R. 22, 23) was issued December 10, 1932, and required action by Appellees "on or before January 25, 1933," which date was extended by the Commission to June 1, 1933 (R. 31), during all of which time the Appellees, to obtain a full hear-

ing thereon, had only to file the rates mandated by the order and then, within ten days and before they became effective, file complaint against them with the Commission. Upon the filing of such complaint the Commission was legally empowered to suspend the execution of such order pending the conclusion of the hearing (Interstate Commerce Act, Sec. 15 (7), U. S. C. Title 49, Copy attached as Appendix B). Appellees elected not to file any such complaint (R. 30) and presented their Bill in Equity to a Federal Court in Delaware asking that said order be declared void and that its enforcement be perpetually enjoined. The Bill named the United States of America and the Interstate Commerce Commission as defendants; and the American Barge Line Company, the Inland Waterways Corporation, the Mississippi Valley Barge Line and the Mississippi Valley Association were permitted to intervene as defendants.

Appellees asserted that the Act of Congress first above mentioned, as construed and acted upon by the Commission, is unconstitutional because it denies Appellees the right to offer testimony and show facts, circumstances and conditions so as to enable the Commission, before entering said order, to determine whether the public interest requires the routes combining the water service of American Barge Line Company with rail routes under the rates ordered; whether such rates should be lower than the contemporaneously existing all-rail rates; a comparison of the transportation costs via the routes ordered with transportation costs via all-rail routes; a comparison of the needs of Appellees for revenue with the financial needs of American Barge Line Company; whether the establishment of such routes and rates would substantially impair the revenues of Appellees; and whether, having regard to the level of the all-rail rates, public interest and the maintenance of an adequate transportation system required or permitted the establishment of said

joint routes and rates. They identified their injury as the loss in revenue on cotton which, they allege, will be diverted to the joint routes.

Appellants contended that the Appellees had not exhausted their legal remedies; that they neither alleged or proved the existence in them of any legal right which was injured or threatened; that the Statute did not deny Appellees a hearing but, on the contrary, provided for an adequate one, and that the showing Appellees allege they could make at such hearing would be immaterial; and that Appellee's essential pleadings were mere conclusions and suppositions which could form no basis for equitable relief. The essential allegations in the Bill were denied under oath and it was moved that the Bill be dismissed.

The hearing before the three-judge Court (U. S. C. Title 28, Sec. 47) on Appellees' motion for preliminary injunction was, in accord with stipulation (R. 116), considered by the Court as a final hearing on the merits. No evidence was taken. The case was tried and disposed of on the pleadings and affidavits appearing in the printed record, except that, by error, Exhibit A to the affidavit of General T. Q. Ashburn (R. 75) was omitted in printing and Exhibit B was printed (R. 76) as Exhibit A to this affidavit.

Two of the Judges hearing the case, in separate opinions (R. 117 to 127) awarded to Appellees the relief asked for but on different grounds. The third Judge believed the Bill should be dismissed because Appellees had not shown any property right which was actually injured or threatened with injury.

The opinion written by Circuit Judge Thompson may be fairly construed to grant relief in Equity without requiring the showing of a real or threatened deprivation of property right merely because the order complained of was "unquestionably and admittedly made by the Commission without according the Plaintiffs an opportunity to submit evidence or examine and cross-examine witnesses". (R. 125.) The concurring opinion by District Judge Nields is

based upon the belief that "the hearing by the Commission after filing of its order is a hearing after deprivation of property." Neither in the opinions nor in the findings of fact and conclusions of law do the Judges point to any deprivation of property that has accrued or may accrue. The dissenting opinion by District Judge Dickinson calls attention to the proposition, admitted by the Plaintiffs in the Court below (Appellees here), that the rail carriers have no property right in prospective traffic or traffic not committed to them and expresses his belief that the order in question can not deprive Appellees of property that has no existence.

From the decree by the lower court annulling and setting aside the order of the Commission and enjoining its enforcement appeal has been perfected to the Supreme Court by all the defendants and this Brief is submitted in that behalf after probable jurisdiction was noted by the last mentioned Court.

ASSIGNMENTS OF ERROR.

The District Court erred:

1. In holding and deciding that section 3 (e) of the Inland Waterways Corporation Act, as amended, U. S. Code, title 49, c. 5, section 153 (e), in authorizing the Interstate Commerce Commission to establish joint rail and water rates without hearing or evidence, constitutes a delegation of pure legislative authority contrary to the provisions of article I, section 1, of the Constitution of the United States.

2. In holding and deciding that section 3 (e) of the Inland Waterways Corporation Act, as amended, in authorizing the entry of an order and compliance therewith, without hearing, denies the parties the right to a judicial review of such order and that such action is arbitrary and unreasonable and in violation of the fifth amendment to the Constitution of the United States.

3. In holding and deciding that the constitutional right of plaintiffs to a full and fair hearing is not complied with by the provision in said section 3 (e) for a subsequent hear-

ing upon the filing of a complaint as provided for and specified in said section.

4. In holding and deciding that the action of the Interstate Commerce Commission in denying plaintiffs' petitions for a hearing and in requiring joint rail and water rates to be established without such a hearing or opportunity to be heard constituted a denial of due process of law, in violation of the fifth amendment to the Constitution of the United States.

5. In not holding and deciding that the provisions of section 3 (e) of the Inland Waterways Corporation Act was a valid and constitutional exercise of the power of Congress.

6. In not holding and deciding that the provision in said section 3 (e), requiring the Interstate Commerce Commission to proceed to a hearing upon the filing of a complaint by an aggrieved carrier, satisfied the due process clause of the fifth amendment.

7. In not holding and deciding that the plaintiffs had failed to exhaust their administrative remedies and that such failure barred the granting of the relief which they sought by their bill.

8. In not holding and deciding that no legal rights of the plaintiffs are affected or threatened by the said order of the Interstate Commerce Commission.

9. In not holding and deciding that plaintiffs failed to allege and prove that any legal injury resulted or would result from the order of the Commission.

10. In entering a decree setting aside the order of the Interstate Commerce Commission and enjoining the enforcement of said order.

11. In not dismissing the bill of complaint.

SUMMARY OF ARGUMENT.

The Inland Waterways Corporation, although not directly interested in the rates under attack, operates in common carriage on the Mississippi River and tributaries, except the Ohio, and its tariff structure consists largely of routes and rates mandated by the Interstate Commerce Commission under the statute which appellees claim to be unconstitutional.

This appellant is interested in sustaining the statute and thus preserving the benefits of the large expenditure of time and money on the part of this appellant and of the appellees that has already occurred under the formulas for determining routes and rates laid down by the Commission.

The procedure under the statute is expeditious, practical and fair, consisting of six steps, one of which affords appellees abundant opportunity for a full hearing as to all pertinent matters.

The statute provides for a full hearing prior to the time when appellees' rights are fixed or in any wise affected, and the constitutional provisions guaranteeing due process of law are fully complied with.

Appellees' claim that Congress has improperly delegated to the Commission legislative power rests upon the thought that a hearing has been denied appellees, and this point turns upon the question of due process. If the opportunity for due process has been adequately afforded, the contention as to improper delegation of power falls.

Appellees' suit has been prematurely brought because their bill affirmatively shows that appellees have failed to exhaust their administrative remedies.

Even if the law be unconstitutional and if the suit has not been prematurely brought, the bill should be dismissed because appellees have not alleged any property right in them which is taken or threatened, and, further, appellees have not supported their allegations as to such property right by competent evidence.

ARGUMENT.

(Note: All routes and rates in which water service combines with rail will be referred to herein as "joint". When no water service is included the reference will be to "all rail".)

This Appellant's Interest.

A large amount of its business in the common carriage of freight on the rivers moves via routes and on joint rates prescribed by the Commission in orders arrived at substantially as were those under attack in this case. Its operating revenues are, largely, derived from this business. It is the information of this Appellant that if the contentions made by Appellees herein are sustained, the rail lines will withdraw from participation in such joint rates and refuse to negotiate with this Appellant looking to the establishment of additional joint routes and rates in connection with this Appellant's Barge Line under the said orders of the Commission (R. 51, 52, 74, 75).

The results of the instant case are likely, therefore, to extend further than the routes and rates under direct attack. The methods devised by Congress for an expeditious handling of such matters are in danger of destruction and the results of the expenditure of a large amount of time and money by the interested carriers by barge and the rail carriers (R. 75) in checking in joint routes and rates in compliance with the formulas laid down in said orders of the Commission will be either immediately nullified or seriously jeopardized.

For these reasons this Appellant presents arguments in defense of the statute under attack before those criticizing the method of the attack.

The arrangement provided for in said statute is practical, simple, expeditious and just. It contemplates six procedural steps:

First. Application by Barge Line to the Commission for a certificate of convenience and necessity (Sec. 3(e), Barge Line Act, Appendix A).

Second. A full hearing is accorded by the Commission (Sec. 3 (e) *ibid.*). Confined to the question whether applicant is entitled to the certificate (R. 33).

Third. Certificate granted if proper showing made and thereupon the Commission orders joint routes to be established on differential rates tentatively fixed or provided for in the order. These must be reasonable (3(e) *ib.*). The order may not, however, take effect before the expiration of such reasonable time as may be fixed by the Commission (U. S. C. 49, Par. 2 of Sec. 15).

Fourth. Complaint by any affected carrier which may or may not include a prayer for supersedeas (15 (7) *ib.*).

Fifth. Suspension of the order granted by the Commission if good cause shown, pending a hearing. (Rule XIX of the Interstate Commerce Commission's Rules of Practice.)

Sixth. A full hearing as to the propriety of the Commission's order given preference over all other matters, at which the complaining carrier has the burden of proof concerning the unreasonableness or unlawfulness of the order.

The orders under attack were made in accordance with the first three steps but the other steps have not been taken because the water carrier involved is apparently satisfied and the rail carriers concerned, although dissatisfied, have carefully refrained from filing any complaint as required by statute, evidently desiring to avoid, if possible, sustaining the burden of showing the "unreasonableness or unlawfulness" of the joint arrangement set out in the Commission's order.

One of Appellees' reasons for attack on the order is that the Commission has misconstrued the law.

It would unnecessarily prolong this brief if we attempted to answer the arguments advanced on this reason. The present Sec. 3(e) of the Barge Line Act either means

nothing or it must be construed as the Commission has done. We are content to rest this phase of the case upon that portion of the opinion of the Court below which sustains the Commission's construction (R. 123 to 125).

THE COMMISSION HAS NOT MISCONSTRUED THE STATUTE.

Opinion of the Lower Court, R. 123 to 125 incl.
Procedure under Barge Line Act, 148 I. C. C. 129.
Lake County vs. Rollins, 130 U. S. 670.
Bate Refrigerator Co. vs. Sulzberger, 157 U. S. 1.
U. S. vs. First National Bank, 234 U. S. 245.
Caminetti vs. U. S., 242 U. S. 470.
U. S. vs. M. P. R. R., 278 U. S. 269.
Russel Motor Car Co. vs. U. S., 261 U. S. 514.
Through Routes and Joint Rates, 153 I. C. C. 129.
Application of American Barge Line Co., 107 I. C. C. 44.
Powers Machine Co. vs. U. S., 282 U. S. 375.
Logan vs. Davis, 233 U. S. 613.
U. S. vs. Hammers, 221 U. S. 220.

THE STATUTE AS CONSTRUED BY THE COMMISSION IS NOT UNCONSTITUTIONAL BECAUSE IN CONTRAVENTION OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES.

Another reason for Appellees' attack is that the law as construed constitutes an unwarranted delegation of Legislative Authority.

Field vs. Clark, 146 U. S. 649.
Butterfield vs. Stranahan, 192 U. S. 471.
U. S. vs. Grimaud, 220 U. S. 506.
St. L. I. & S. Ry. vs. Tayler, 210 U. S. 281.
U. S. vs. Goodrich, etc., 224 U. S. 194.
K. C. S. Ry. vs. U. S., 231 U. S. 423.
I. C. C. vs. Brimson, 154 U. S. 447.
St. L. S. V. Ry. vs. U. S., 245 U. S. 136.
Prentis vs. Atlantic, etc., 211 U. S. 210.
Iron Mountain Rate Cases, 234 U. S. 476.
Wichita R. R. vs. Pub. Utilities Comm., 260 U. S. 48.

Mutual Film Corp. vs. Ohio Ind. Comm., 236 U. S. 245.
Hampton vs. U. S., 276 U. S. 394.
N. Y. Central Securities Co. vs. U. S., 287 U. S. 12.
Fong Yen Ting vs. U. S., 149 U. S. 698.

It is surprising to find any railroads who have not become, at least, reconciled to the right of Congress to delegate to the Commission control over rates, and it may be that Appellees do not mean to question this right, yet nothing short of this can be made out of the allegation in Paragraph X of their Bill (R. 15). If they admit the right to delegate in some instances but deny it here, the denial must rest upon the contention that no provision for prior hearing was made. The matter of prior hearing is not involved in the contention as to the right to delegate. It is an integral part of the controversy as to due process. Further, if the failure to provide a prior hearing is the only fault, and if such a hearing be necessary towards constitutionality, Appellees' complaint is not against unwarranted delegation but is to be translated as a complaint that Congress has delegated to the Commission a power to do what is unconstitutional.

We have not had the advantage of any discussion by Appellees on this point. In the Court below they contented themselves by asserting unconstitutionality on this ground by way of a proposition under which they cited, without argument, a number of authorities the examination of which does not aid us in discovering Appellees' line of reasoning.

In spite of our confusion as to what Appellees contend on this point, the proposition appears to be seriously asserted and, as well, differentiated from Appellees' propositions as to due process. Hence we feel that we must discuss it separately.

The Courts have sustained Acts which delegated to agencies the powers which the Legislature may rightfully exercise itself. See Wayman vs. Southard, 10 Wheat. 1. Also

the power to determine matters as to duties on imports. See Field vs. Clark (*supra*). To make regulations for sheep raising in government reservations and make violations thereof criminal. See *U. S. vs. Grimaud* (*supra*). To delegate to American Railway Association, a private body, the function of ascertaining, without hearing, the standard weight of draw bars for freight cars. See *St. L. I. & S. Ry. vs. Taylor* (*supra*). To the Interstate Commerce Commission the power to prescribe the manner in which accounts of Railroads should be kept. See *U. S. vs. Goodrich*, etc. and *K. C. S. Ry. vs. U. S.* (*supra*). To investigate the whole subject matter of Interstate Commerce and to require attendance of witnesses (see *I. C. C. vs. Brimson, supra*); To compel the establishment of rates. (*St. L., S. V. Ry. Co. vs. U. S., supra.*)

Among the following cases cited by Plaintiffs in the Court below (Appellees here) under their proposition on this point, we find *Prentis vs. Atlantic, etc.* (*supra*), wherein, although the case went off on another point, this Court apparently believed that rail rates fixed by a Commission to whom authority had been delegated by the Legislature were not open to constitutional question; also *Iron Mountain Rate Cases* (*supra*), wherein this Court held the long- and short haul provisions of the Acts to regulate commerce were not repugnant to the Constitution as an improper delegation of legislative power; *Wichita R. R. Co. vs. Pub. Utilities Comm.* (*supra*) wherein the Court did not question the delegation to the Commission of powers but held that the Commission's findings did not justify its order; *Mutual Film Corp. vs. Ohio Ind. Comm.* (*supra*), wherein the delegated right of a commission, with very scant hearings, to censor motion picture films was upheld; *Hampton & Co. vs. U. S.* (*supra*), which upheld delegation of power to the President to increase or diminish tariff duties; *N. Y. Central Securities Co. vs. U. S.* (*supra*), which upheld the Commission's delegated authority to permit assumption by one railroad of indebtedness of other roads; *Fong Yen*

Ting vs. U. S. (*supra*) and other exclusion cases, upholding delegation to Revenue Collectors of the right to make certain determinations as to Chinamen. We think these cases fully sustain our proposition and negative that of Appellees.

THE LAW, AS CONSTRUED BY THE COMMISSION, AFFORDS ABUNDANT OPPORTUNITY FOR A FULL HEARING AND, THEREFORE, DOES NOT DENY DUE PROCESS.

This proposition negatives the final reason in Appellees' attack.

If the statute assured a hearing anterior to the effectiveness of the mandated routes and rates, the rail lines would not have brought this suit unless, indeed, a hearing is not so much their desire as is a destruction of the statute. We, therefore, assume that their contentions rest upon the thought that the law does not adequately provide for a hearing.

THE CONSTITUTIONALITY OF THE LAW DOES NOT DEPEND UPON ANY EXPRESS PROVISION FOR A HEARING. THE TEST, UNDER THE DUE PROCESS CLAUSES, IS: HAS A HEARING IN DUE COURSE OF LEGAL PROCEEDINGS BEEN DENIED IN SUCH TERMS THAT THE COMPLAINANT HAS NO OPPORTUNITY TO BE HEARD BEFORE HIS RIGHTS BECOME FIXED.

Rees vs. Watertown, 19 Wall. 107.
Pittsburgh, etc. Ry. vs. Backus, 154 U. S. 421.
Hodge vs. Muscatine, 196 U. S. 276.
Hagar vs. Reclamation Dist., 111 U. S. 701.
Davidson vs. New Orleans, 96 U. S. 97.
New Haven R. R. vs. I. C. C., 200 U. S. 361.
U. S. vs. Antikamnia Co., 231 U. S. 654.
Ash Sheep Co. vs. U. S., 252 U. S. 159.
Goldsmith vs. Board of Tax Appeals, 270 U. S. 117.

Home Telephone Co. vs. Los Angeles, 211 U. S. 265.
New Haven R. R. v. I. C. C., 200 U. S. 361.

In many of the Tax cases bearing on this point, there was no express provision for a hearing of the disgruntled taxpayer, yet all uphold the otherwise lawful assessments against attacks based on lack of due process, as is illustrated by the case of *Pittsburgh Ry. vs. Backus* (*supra*), wherein the Court notes that the tax board "has a time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of anyone before it to assert a right, or redress a wrong," and states, "a hearing before judgment, with full opportunity to present all the evidence and arguments which the party deems important, is all that can be adjudged vital."

Other tax cases concern legislation providing for a hearing and are illustrated by *Hodge vs. Muscatine* (*supra*), wherein the law permitted the taxpayer to make application for a hearing to remit the tax. This parallels the provision in the Barge Line Act which provides for hearing on complaint. If the application was denied, he could apply to the District Court for judicial determination as to liability. In the instant case, if the Commission refused supersedeas during hearing on complaint, Appellees might be able to allege a real, not imaginary, threat to their rights, to protect which they could apply to the Courts for supersedeas. In the case last cited the Court held that if opportunity was given "to test the validity of the tax at any time before it is made final * * * due process is not denied." The learned District Judge who joined in the majority opinion in this case by the lower Court appears to believe that the doctrines announced in Tax cases do not apply in cases like the one now before the Court and he calls attention to the cases of *Hagar vs. Reclamation District* (*supra*), and the *Standard Oil vs. McLaughlin*, 55 Fed. (2nd) 274, in support.

The first case he mentioned does make a distinction be-

tween what may be necessary to constitute due process in tax cases and what is needed in cases involving the taking of life, liberty, or property. However, the language used contains nothing to indicate that, in an appropriate case not involving taxation, a similar kind of hearing as was afforded in the *Hagar* case would not have constituted due process. In fact, Mr. Justice Field, in the *Hager* case, quotes with approval from *Davidson vs. New Orleans* (*supra*), as follows:

> "In judging what is 'due process of law' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.'"

Tested by the views of the two Justices here quoted, we find the "cause of the taking," if there be any taking, in the instant case, was, as is shown by the House Report quoted by the lower Court in its opinion (R. 124), opposition on the part of many of the Rail roads which had resulted in years of delay in the extension of the benefits of water transportation to interior communities and the "object" was to make available through routes, joint rates and an equitable division of joint rates, to afford to the people of a large part of the country the economies of cheaper transportation by water. It is by this cause and object that the provisions of the statute which Appellees attack should be measured. If the views of Appellees are sustained, the object will be defeated and the thing which caused the legislation will go unremedied.

The other case noted by Judge Nields (R. 127) merely cited the *Hager* case.

The interest of the Legislature is the ever insistent consideration in the interpretation of statutes which are to be

construed so as to effectuate the purpose sought to be achieved. See *New Haven R. R. vs. I. C. C.; U. S. vs. Antikamnia Co.; Ash Sheep Co. vs. U. S.* (*all supra*).

Nor is this reasoning applied exclusively to tax cases.

The case of *Goldsmith vs. Board of Tax Appeals* (*supra*) was one in which the plaintiff, having been denied without hearing the right to practice before the Board, without asking the Board to give him hearing, went to Equity in an effort to mandamus the Board. The Court called attention to the fact that he was entitled, as a matter of law, to a hearing which was not expressly denied him, but refused relief because he had not sought a hearing. This parallels the instant case and indicates that it has been prematurely brought, a point to be discussed later.

In *Home Telephone Co, vs. Los Angeles* (*supra*), the validity of telephone rates fixed by the City Council without a formal hearing was involved. The ordinance requiring regular meetings of the City Council did not specifically provide otherwise for a hearing but authorized fixing of rates on statements of receipts, expenditures, etc., to be rendered annually by the Telephone Company. The Company declined to furnish the information, and the rates having been fixed, attacked them in the equity courts alleging lack of due process. The Court held that "a sufficient notice and hearing were offered to Appellant, if it had chosen to avail itself of them, instead of declining to furnish all information as it did." We contend that in the instant case a sufficient opportunity for a hearing has been at all times open to Appellees, if they had chosen to utilize it.

THE STATUTE AFFORDS OPPORTUNITY FOR A HEARING BEFORE RIGHTS ARE DESTROYED OR PROPERTY TAKEN.

The only acts required by Appellees to secure a hearing are to file the mandated schedules with the Commission and their complaint against them.

EQUITY COURTS WILL NOT ASSUME, IN ADVANCE, THAT A STATUTE WILL BE ADMINISTERED IN AN UNCONSTITUTIONAL WAY, IF IT MAY BE ADMINISTERED CONSTITUTIONALLY.

St. Louis S. W. Ry. vs. Arkansas, 235 U. S. 351.
Barge Line Act, Sec. 3(c) (*supra*).
Sec. 15 (7), Interstate Commerce Act (*supra*).

Presumption that the act is valid.

Chicago, Milwaukee, etc. vs. Massachusetts, 207 U. S. 79.

In case of real doubt the law must be sustained.

Bradley vs. Richmond, 227 U. S. 477.
Arizona Gro. Co. vs. Atchison Ry., 284 U. S. 370.
Prentis vs. Atlantic, etc., 211 U. S. 210.
L. & N. vs. Garrett, 231 U. S. 298.
Terminal R. R. vs. U. S., 266 U. S. 17.

In the St. L. S. W. Ry. case just cited, the Court said: "We ought not to indulge the presumption either that the legislature intended to exceed the limits imposed upon State action by the Federal Constitution or that the Courts of the State will so interpret the legislation as to lead to that result."

The issue in the case just quoted from was the validity of a state statute which required payment by a Railroad of a franchise tax and that authorized the forfeiture of the Road's right to do business in the State if the tax was not paid. At the time of pendency of the suit the State had not moved to forfeit but was suing for the tax as a debt. To destroy the statute and thereby avoid the debt, the Railroad contended that the statute authorized the forfeiture and was therefore unconstitutional.

The analogy between the case just quoted from and the instant case appears to us to be close.

In Bradley vs. Richmond (*supra*), involving a licensing ordinance, classification was first made and then notice and opportunity to be heard was afforded. In the instant

case the carriers are granted a hearing if they first file the schedules. Appellees appear to think that such a hearing will not afford them protection and they ask this Court to presume that it will not. The words of the opinion in the case last mentioned are peculiarly applicable to this state of affairs. The Court said:

> "If the right to appear and be heard and to obtain a review should prove illusory, there would, under general rules of jurisprudence, remain the right to judicial review, if the result should violate either a right received under the law of the State or that of the United States."

Should Appellees assert that this quotation refers to the right which they are asserting in the instant case, we retort that they do not here seek a review but a cancellation. This Court cannot review the matter of rates. This is a purely legislative function. Arizona Grocery Co. vs. Atchison Ry.; Prentis vs. Atlantic Coast Line; L. & N. Ry. vs. Garrett (all *supra*). Appellees are attempting to destroy the statute rather than obtain a review.

SINCE THE STATUTE PROVIDES A MEANS FOR A HEARING THAT MAY BE EFFECTIVELY AVAILED OF BEFORE PROPERTY IS ACTUALLY TAKEN, IT IS NOT A DENIAL OF DUE PROCESS AND IS CONSTITUTIONAL.

Londoner vs. Denver, 210 U. S. 373.

This case, cited by Appellees in the Court below, was one brought in the Courts of Colorado to relieve lands from an assessment of tax for the cost of paving, the contention being that the statute involved denied due process. In the course of the proceedings the provision of the statute providing for notice and opportunity for hearing was not followed but the City Council sent out notice that it would hear and consider written complaints, but appointed no time and place and did not set for hearing nor hear the

Plaintiff's complaint. The Court expressly sustained the statute as constitutional so that it does not appear to be in point under Appellees' contentions. We desire, however, to call attention to the very clear statement of Mr. Justice Moody of the principle here involved, which is applicable generally as well as in tax cases. He said, the emphasis being ours:

> "In the enforcement of such restrictions as the Constitution does impose this Court has regarded substance and not form. But when the Legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be laid, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings, *before the tax becomes irrevocably fixed*, the taxpayer shall have an opportunity to be heard."

It will be further explanatory of this case if we add his further words: "It must be remembered that the law of Colorado denies the landowner the right to object in the Courts to the assessment, upon the ground that the objections are cognizable only by the board of equalization."

The additionally quoted words indicate that the learned Justice believes that if opportunity for review by the Courts had not been denied by the statute, the Equity Arm would not have interfered. If so the litigant in that case would have been required, as Appellees should be required to do in this case, to exhaust his legal remedies before appeal to Equity.

Appellees cite the Dartmouth College case, 4 Wheat. 517, and others which involve the question as to whether laws are unconstitutional because they impair the obligation of contracts. We are unable to discover how they throw light on the instant case.

The cases cited in the Court below by Appellees, involving questions arising under the Interstate Commerce Act, are not applicable to the instant case because that act ex-

pressly provides prior hearings while in this case the hearing is provided for after the entry of the Commission's order tentatively fixing rates.

Most of the cases so cited by appellees not involving said Act are so far from supporting Appellees' contentions that we believe they support ours. An instance is the case of Murry vs. Hoboken Land Co., 18 Howard, 272, which, if applicable at all, is distinctly in support of our last above proposition.

THIS SUIT IS PREMATURELY BROUGHT, APPELLEES HAVING FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES.

The latest case enunciating the principles here relied on is, we believe, Porter vs. Investors Syndicate, 286 U. S. 461, wherein it appeared that the State of Montana had confided jurisdiction of the administrative details of a law regulating the conduct of investment business within the State to a Commissioner whose permit was required as a condition to conducting such business and who was given authority to cancel any such permit. The Syndicate's permit had been so cancelled. The law gave the State District Court the right of review of all orders of the Commissioner. Without asking for such a review, the Syndicate sought, in the Federal Court, to enjoin enforcement of the order of cancellation. A statutory three-judge court granted the injunction, and an appeal was taken. In reversing the decree awarding injunction, the Court said:

> "We are of opinion that the appellee failed to exhaust its administrative remedy before applying to the district court for injunctive relief. The granting and revocation of permits is an exercise by the appellant of delegated legislative power. Section 4038 of the Code (*supra*) confers on any interested person dissatisfied with a finding or decision by the Commissioner, the right within thirty days to bring an action against him in a state district court to vacate his order

> and set it aside as unjust or unreasonable, and directs that on the hearing the judge 'may set aside, modify, or confirm said * * * decision as the evidence and the rules or (*sic*) equity may require.' The section confers the right to appeal to the state supreme court from the judgment of the trial court. Clearly the function of the state district court under the statutory mandate is not solely judicial, that is, to set aside a decision of the commissioner if arbitrary or unreasonable and hence violative of constitutional rights. * * * The legislative process remains incomplete until the action of that court shall have become final. * * * And the capacity in which the court acts is none the less administrative because the proceeding is designated as a suit in equity instead of by appeal. * * * When the appellee was notified on June 22, 1931, that the rule adopted by the appellant would become effective July 22nd of the same year an action could have been filed in the state court and a hearing had upon all questions of fact and law touching the propriety of the order."

Here is a direct holding which, if applied to the instant case, would require that Appellees, before resorting to the Equity Arm of the Courts, exhaust their administrative remedies. The legislative function vested by the statute in the State Courts corresponds to the function of review on complaint vested in the Commission. A decision more nearly final had been made by the Commissioner in the Investors Syndicate case than in the instant case in that, if the right to supersedeas existed at all in the former case, it arose by implication only. The situation of Appellees is more fortunate. The statute expressly gives the Commission the right to supersede (Sec. 15 (7) *supra*). It is likely that they could have obtained supersedeas before the rates became effective by merely asking the Commission for it.

In their briefs below Appellees contended that they were pursuing, in this case, "the only remedy available to them and one expressly provided for by statute," and cited Wadley Southern Ry. vs. Georgia, 235 U. S. 651, in support.

This is an interesting case, particularly because its characteristics are so similar to those of the instant case. In both a Railroad refuses to obey orders of a Commission, contending they are void. In both the statute provides a remedy by way of hearing or review which the railroad refuses to avail itself of. In both the Railroad contends that it could not do so without being liable to pay statutory penalties. We fear the analogy stops at this point. The suit was brought by the State to collect penalties which the statute provided against refusal to obey the Commission's orders and it may be that the application of the legal principles involved takes a different turn from that proper in the instant case. If the latter was a suit to collect the penalties which Appellees refer to in paragraph XI of their Bill (R. 16), viz., "irreparable injury will occur to plaintiffs in that they will be compelled under the severe penalties prescribed by the Interstate Commerce Act," etc., the two cases would be almost exactly parallel. The extent of differentiation is such, however, that the most that we feel justified in claiming is that the Wadley Southern case does not support Appellees' contention but is persuasive on the proposition that Appellees are not entitled to equitable relief until after they have attempted and failed to secure protection of such legal rights as they may have by filing a complaint with the Commission.

APPELLEES HAVE NOT SHOWN THAT ANY OF THEIR LEGAL RIGHTS HAVE BEEN OR WILL BE TAKEN BY SAID ORDER NOR THAT THEY OR ANY OF THEM WILL SUFFER ANY LOSS OF PROPERTY UNLESS THE EXECUTION OF THE ORDER IS ENJOINED.

The averments affecting the above proposition are twofold, one being that the Commission was without jurisdiction to enter said order because it denied Appellees the right and opportunity to show, by testimony, six things. (R. 13 and 14.)

The first showing they say they would have made is "that the public interest did not at any time and does not now require the establishment" of the routes and rates mentioned in said order; the second is that, if the routes were established, the joint rates should not be lower than the all-rail rates.

So much of the Statute in question which authorized the Commission to grant or refuse to grant, according as its findings as to public convenience and necessity might dictate, a certificate to the American Barge Line, is not attacked nor criticized by the Appellees. Neither is the provision attacked which gives a certificated barge line the right to operate in connection with rail lines on differentially constructed rates. The Commission, after a full hearing (R. 33) in which the rail carriers participated, had granted such a certificate before the order in question was applied for and the Commission had remarked in the course of the proceedings (R. 34):

> "Under the Denison Act the establishment of appropriate joint rail-and-water rates, when and if a certificate is granted, flows from the mandate of the Statute. The possible effects of such establishment in depriving rail carriers of some traffic and earnings which they might otherwise continue to hold to their lines, is a matter of policy which the Congress must be presumed to have taken into consideration in the enactment of the Statute and is not a matter which we are authorized to consider, etc."

The words "public interest," as used in the allegation, can have no significance that is not also included in the words "public convenience and necessity." From this it follows that the first showing which Appellees allege they could have made had been foreclosed, both by the Statute and by the Commission, prior to the date of the application for the order complained of. Manifestly, the showing under this allegation would not have been pertinent to any hearing such as suggested by Appellees.

As to the second showing, the Commission has stated its opinion to be that "under the law the differentials must be such that the joint rail-water transportation to which they relate shall be upon terms reasonably fair to both rail and water carriers, not designed to divert traffic from one or the other, but to reflect differences in cost and value of service." (R. 21, 22.) If the Commission's view as to what the law requires be correct, and we think it is so, a showing by Appellees under their second allegation would have availed them nothing.

The next showing which Appellees assert they could have made is that the transportation costs via the joint routes are and would be substantially equal to the transportation costs via all-rail routes. Whether they mean to refer to the costs to the public or those of furnishing the service is not plain, but it may safely be inferred that it is the latter costs that they refer to. If this be true, it is possible that such a showing, if made, would be pertinent to the inquiry, but the difficulty here is that the allegation is a mere statement of supposition or conclusion on the part of the pleader, concerning which absolutely no proof has been offered. The question of support of these allegations by proof will be adverted to later.

The next three showings which Appellees allege they might have made refer to the fact that each of the Appellees has been and is in need of revenue which they state will be substantially impaired by the order. Here we find further matter that would not be pertinent to any inquiry concerning the complained of order. On March 11, 1932, the Commission reported on the application of American Barge Line Company (R. 34) and, among other things, states:

> "The opposing rail carriers state that their facilities are more than adequate to handle all traffic offered for shipment between points which would be affected by the application and stress the adverse effects on their already diminished traffic and earnings which they claim will result from the differential joint rail-

and-water rates which would be required to be established if the certificates were granted."

It should be noted here that the Commission was considering the application for a certificate upon which a 'full hearing' had been accorded. The Commission then disposed of the point in the following language (R. 34):

> "These representations are similar to those made by rail carriers in other proceedings of this nature and which we have found not to be such as to warrant the withholding of a certificate to a water line otherwise entitled thereto."

From all the above it clearly appears that even if the Appellees had been granted a hearing and afforded an opportunity to show the six things which they allege they could have shown, only one of these six could possibly have affected the question involved in such a hearing, and that showing, if it had been made by the most satisfactory proof possible, would have affected only one of the elements which the Commission regarded as at all determinative in arriving at the solution of the problem, namely, differences in cost of service. There would still have been left the element of difference in value of service as between joint rail-and-water and all-rail rates.

We do not contend that it is a sufficient answer to Appellees' contention of lack of due process to say that if due process had been accorded, the order would not have been changed. Our remarks are now addressed to the sufficiency of Appellees' allegations and we contend that these show that they have suffered no injury by being denied an opportunity to prove the things they say they would have proved. The allegations here criticized were descriptive of the injury, not of the reason for it.

The mere fact that a duly enacted law is unconstitutional does not entitle Appellees to relief by injunction against proceedings in compliance therewith. McChord vs. L. & A.

R. R., 183 U. S. 483. Injury must be alleged and the allegation must be tested by its own terms.

The other averment is substantially that Appellees will lose future traffic and the revenue therefrom. There is no assertion in the Bill nor in the affidavits filed by appellees nor elsewhere in the Record, either by way of allegation or proof, that Appellees or any of them will suffer any loss except of prospective traffic which may be diverted to the joint routes mentioned in the order. Every averment and every affidavit statement affecting this point is prospective, not immediate, in its terms. The statements are to the effect that traffic "will be diverted" from the rails, thus causing Plaintiffs damage and loss. (R. 11, 12.) The findings of fact filed by the lower Court contain nothing to aid this situation. The words therein which most nearly approach a finding of deprivation of property occur in the third finding (R. 118) and refer to future traffic:

> "The natural and normal effect of such participation (by the rail lines) in through routes and rates with the American Barge Line Company would be to divert cotton, in carloads, from the all-rail routes previously established to the lower rail-barge-rail and barge-rail routes."

The averments as to future loss of traffic are conclusions and argumentative deductions which were traversed and, under the rules of pleadings, are not to be considered as admitted. I. C. C. vs. Goodrich Transit Co., 224 U. S. 194. The affidavits submitted by Appellees are subject to the same criticism. None of the affiants qualifies as an expert on the subject except, possibly, General Ashburn, whose affidavit was presented by this Appellant (R. 74, 75, 76). He claims familiarity during more than eight years with the interchange of freight "moving via rail and water carriers in joint through routes" and states that "transportation via barge line is necessarily and inherently slower and less desirable to shippers than is transportation by rail,

and that in order to attract any business the barge line must be able to quote rates that are considerably lower than those quoted by the rail carriers." All the other affiants claimed no more than familiarity with Railroad traffic matters. Not one of these asserts that he has either studied or had experience with the effects on the movement of cotton or other freight caused by barge competition. They assert that the rates complained of will divert cotton from the rails but they are not speaking as experts when they do so and, so far as the Record shows, their opinion on the matter is no more evidential than would be the guess of any man on the street.

The most that can be said of the Record on this phase of the case is that the order names joint rates on cotton that are from four to eight cents per hundred pounds lower than all-rail rates (R. 23), that the lower rates are partly via barge and less desirable to shippers than all rail and that to attract business barge rates must be considerably less than all-rail. The finding of the lower Court above quoted is based wholly upon a conclusion which we contend is unwarranted, as to the "natural and normal effect" of this state of affairs. As to whether or not these joint rates are sufficiently low to attract business is left to conjecture. No affiant claims to know of any shipper who will utilize the joint rates and no one professes to definitely know that a single bale of cotton will be diverted from the rails. It is by no means safe to assume that diversion will occur.

We therefore contend that the Record is wholly devoid of any showing of loss or injury that should be recognized as such even under the liberal rules of equity procedure; but even if we assume that the showing is sufficient, the loss or injury is not such as will support the Bill.

The allegations of the Bill do not contain the element of confiscation. The alleged result of the order as "unlawfully diverting shipments of cotton from the all-rail routes" is the sole basis of injury alleged or shown.

The able District Judge Dickinson based his dissent from the majority opinion below upon the thought that the Appellees have no property right in prospective traffic.

A. T. & S. F. Railway vs. U. S., 279 U. S. 768.
Penn. R. R. Co. vs. U. S., 40 F. (2d) 921.
Indian Valley R. R. vs. U. S., 52 F. (2d) 485.
Pittsburgh, etc. Ry. Co. vs. U. S., 281 U. S. 479.
Sprunt and Son vs. U. S., 281 U. S. 249.
Hines, Trustee, vs. U. S., 263 U. S. 143.
Claiborne-Annapolis Ferry vs. U. S., 285 U. S. 382.

In all of these cases the desire on the part of the carrier to continue to enjoy in the future as it had in the past either the benefits of a competitive advantage or a monopoly in transportation was asserted as if it was a legal right entitled to protection under the constitutional guarantees. In all such cases the courts refused to sanction such an assertion and uniformly held to the effect that a carrier had no legal right to continue in the enjoyment, in the future, of traffic previously handled. It was probably under these cases that appellees' counsel admitted in the Court below the lack of such legal right in their clients.

The Pittsburgh Ry. case (*supra*) appears to have been overruled by the Ferry case (*supra*) in that the former held that the carrier, asserting no more than desire to enjoy prospective traffic, had no right to bring suit to enjoin the construction of competitive facilities, while the latter case held that such desire created a sufficient interest to permit the bringing of the suit but did not recognize such desire as a legal right to be protected by the Courts. In the Pennsylvania R. R. case and the Indian Valley R. R. Co. case (*supra*) the holding was that the desire to continue to enjoy traffic in the future is not a right upon which a suit to enjoin the construction of a competitive line could be *based*. In the Hines, Trustee, and Sprunt and Son cases (*supra*) the holding was worded slightly differently but it was to the same effect, namely, that such a suit could not *be main-*

tained on a showing of rights in prospective traffic. In the Santa Fe Railway Co. case (*supra*) the Court refused to recognize that the desire of the originating carrier to retain traffic to its line entitled it to injunctive relief against an order of the Commission disapproving the proposed schedules, and said, "There is no rule of law or practice which gives to a carrier the right to recapture traffic which it originates."

Neither a loss of enjoyment in the future of traffic formerly carried nor a prejudice to a competitive advantage are legal injuries which will support appellees' bill, hence their case must fail.

CONCLUSION.

The judgment of the Court below should be reversed and Appellees' Bill dismissed.

Respectfully submitted,

CLARK C. WREN,
Solicitor for Appellant,
Inland Waterways Corporation.

APPENDIX A.

Copy of the Act incorporating the Inland Waterways Corporation Public No. 185, 68th Congress, as amended.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That for the purpose of carrying on the operations of the Government-owned inland, canal, and coastwise waterways system to the point where the system can be transferred to private operation to the best advantage of the Government, of carrying out the mandates of Congress prescribed in section 201 of the Transportation Act, 1920, as amended, and of carrying out the policy enunciated by Congress in the first paragraph of section 500 of such Act, there is hereby created a corporation, in the District of Columbia, to be known as the Inland Waterways Corporation (hereinafter referred to as the "corporation"). The Secretary of War shall be deemed to be the incorporator, and the incorporation shall be held effected upon the enactment of this Act. The Secretary of War shall govern and direct the corporation in the exercise of the functions vested in it by this Act.

(As amended U. S. Code, Sup. VI, Title 49, C. 5 Section 153)

SEC. 2. The capital stock of the corporation shall be $15,000,000, all of which is hereby subscribed for by the United States. Such subscription shall be paid by the Secretary of the Treasury, within the appropriations therefor, upon call from time to time by the Secretary of War. Upon any such payment a receipt therefor shall be issued by the corporation to the United States and delivered to the Secretary of the Treasury, and shall be evidence of the stock ownership of the United States. There is hereby authorized to be appropriated the sum of $10,000,000 in addition to the $5,000,000 heretofore authorized for the purpose of paying such subscription.

"SEC. 3 (a) Until otherwise directed by Congress, the corporation shall continue the operation of the transportation and terminal facilities now being operated by or under the direction of the Secretary of War under section 201 of the Transportation Act, 1920, as amended, and shall continue to operate the facilities now being operated or that may hereafter be operated by it under the provisions of this

Act; and shall, as soon as there is an improved channel sufficient to permit the same, initiate and continue the water carriage heretofore authorized by law upon the Mississippi River above Saint Louis.

"(b) When the improvement of any tributary or connecting waterway of the Mississippi River, not including the Ohio River, shall have been completed or advanced to the point where within two years thereafter there will have been substantially completed a sufficient and dependable channel for the safe operation of suitable barges and towboats thereon; and when the Chief of Engineers of the United States Army shall certify that fact to the Secretary of War, the Secretary of War shall thereupon cause a survey of such tributary or connecting waterway to be made for the purpose of ascertaining the amount of traffic, the terminal facilities, and the through routes and joint tariff arrangements with connecting carriers, that are or will, within such years, probably be available on such tributary or connecting waterway. As soon thereafter as such survey shall have been completed and a sufficient and dependable channel for the safe operation of suitable barges and tow boats shall have been substantially completed, the Secretary of War may, if he finds from such survey that water transportation can, in the public interest, be successfully operated on such tributary or connecting waterway, extend the service of the Inland Waterways Corporation thereon as soon as the corporation shall have suitable facilities available therefor.

"(c) It is hereby declared to be the policy of Congress to continue the transportation services of the corporation until (1) there shall have been completed in the rivers where the corporation operates, navigable channels, as authorized by Congress, adequate for reasonably dependable and regular transportation service thereon; (2) terminal facilities shall have been provided on such rivers reasonably adequate for joint rail and water service; (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; and (4) private persons, companies, or corporations engaged, or are ready and willing to engage, in common-carrier service on such rivers.

"(d) When the Secretary of War shall find that navigable channels and adequate terminals are substantially available as provided in paragraph (c) of this section, and when the Interstate Commerce Commission shall report to the Secretary of War that joint tariffs with rail carriers have been published and filed as provided in said paragraph, the Secretary of War is hereby authorized to lease for operation under private management, or to sell to private persons, companies, or corporations, the transportation facilities, or any unit thereof, belonging to the corporation: PROVIDED, that for the purpose of this paragraph the facilities of the corporation on the Mississippi River and its tributaries shall be considered as one unit, and those on the Warrior River and its tributaries one unit; PROVIDED FURTHER, That the facilities of the corporation shall not be sold or leased (1) to any carrier by rail or to any person or company directly or indirectly connected with any carrier by rail; or (2) to any person, company, or corporation who shall not give satisfactory assurance and agree, as part of the consideration for such sale or lease, that the facilities so sold or leased will be continued in the common-carrier service in a manner substantially similar to the service rendered by the corporation, together with ample security by bond or otherwise to insure the faithful performance of such agreement; or (3) until the same has been appraised and the fair value thereof ascertained and reported to the President by the Interstate Commerce Commission, and the sale or lease thereof has been approved by the President.

"(e) Any person, firm, or corporation, including the Inland Waterways Corporation, engaged or about to engage in conducting a common-carrier service upon the Warrior River or the Mississippi River, or any tributaries thereof, may apply to the Interstate Commerce Commission and obtain a certificate of public convenience and necessity in accordance with the provisions of section 1 of the Interstate Commerce Act, as amended, and the Interstate Commerce Commission shall thereupon, by order, direct all connecting common carriers and the connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, as provided in paragraph (3) of section 15 of the Interstate Commerce Act, as amended, and the commission shall, in such order, fix reasonable minimum differentials between all rail rates

and joint rates in connection with said water service to apply until changed by order of the commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the commission or by agreement of the water carriers and the other participating carriers. The Commission shall further require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions of the aforesaid joint differential rates within thirty days after such joint rates are established, and if the carriers are unable to agree upon equitable divisions within one hundred and twenty days from date of publication the commission shall, by order, determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates. The commission is hereby given authority upon complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the commission, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates ordered by the commission under the provisions of this Act; and after full hearings the commission may make such order with reference to any such matters as it may find to be proper and in the public interest. At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint; and the commission shall give the hearing and decision of such questions preference over all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible: PROVIDED, That if the Inland Waterways Corporation sells or leases its transportation facilities to any person, firm, or corporation to be operated as a common carrier, such person, firm, or corporation shall be entitled to a certificate of public convenience and necessity upon making application therefor; and all through traffic arrangements and joint tariffs with rules, regulations, and practices in connection

therewith published by the Inland Waterways Corporation and filed with the Interstate Commerce Commission and participated in by other carriers shall remain in full force and effect between such carriers and the person, firm, or corporation purchasing or leasing such transportation facilities from the Inland Waterways Corporation and operating the same as common carriers until changed by order of the commission, except that such through-traffic arrangements and joint tariffs, with rules, regulations, and practices therewith, may be changed by mutual consent of the water carrier and the other participating carriers. Joint rail and water rates as herein used shall be deemed to include every movement of traffic in which a water line can participate.

"(f) The operation of the transportation and terminal facilities under this Act shall be subject to the provisions of the Interstate Commerce Act, as amended and to the provisions of the Shipping Act, 1916, as amended, in the same manner and to the same extent as if such facilities were privately owned and operated; and all vessels of the corporation operated and employed solely as merchant vessels shall be subject to all other laws, regulations, and liabilities governing merchant vessels."

SEC. 4. (a) The Secretary of War shall appoint an Advisory Board of six members (hereinafter referred to as the "board") from individuals prominently identified with commercial or business interests in territory adjacent to the operations of the corporation. No member of the board shall be an officer, director, or employee of, or substantially interested in, any railroad corporation. Two of such members shall continue in office for terms of one year, and the remaining four for terms of two, three, four, and five years, respectively, from the date of appointment, the term of each to be designated by the Secretary of War. Each successor shall be appointed by the Secretary of War for a term of five years from the date of the expiration of the term of the member whom he succeeds, except that any successor appointed to fill a vacancy occurring prior to the expiration of a term shall be appointed only for the unexpired term of the member whom he succeeds. A vacancy in the board shall not impair the powers of the remaining members to execute the functions of the board.

(b) The members shall receive no salary for their services on the board but, under regulations and in amounts prescribed by the Secretary of War, may be paid by the corporation a reasonable per diem compensation for attending meetings of the board and for time spent on special service of the corporation, and their traveling expenses to and from such meetings, or when assigned to such special service.

(As amended by Pub. No. 663, 69th Congress)

"(c) In addition to the six members, the Secretary of War shall appoint an individual from civil life, or (notwithstanding section 1222 of the Revised Statutes or any other provision of law, or any rules and regulations issued thereunder) detail an officer from the Military Establishment of the United States, as chairman of the board. Any officer so detailed at the date of the passage of this amendatory Act shall, during his term of office as chairman, have the rank, pay, and allowances of a major general, United States Army, and shall be exempt from the operation of any provision of law or any rules or regulations issued thereunder which limits the length of such detail or compels him to perform duty with troops. Any individual appointed from civil life shall, during his term of office as chairman, receive a salary not to exceed $10,000 a year, to be fixed by the Secretary of War. The Secretary of War may delegate to the chairman any of the functions vested in the Secretary by this Act."

(d) The board shall meet for organization purposes when and where called by the Secretary of War, and thereafter at such times and places as the Secretary deems necessary. The board shall consider matters submitted to it by the Secretary of War, and make recommendations thereon, and from time to time advise him and make recommendations, in respect of the management and operation of existing facilities, or the development and operation of new lines.

SEC. 5. The corporation—

(a) Shall have succession in its corporate name during its existence;

(b) May sue and be sued in its corporate name;

(c) May adopt a corporate seal, which shall be judicially noticed, and may alter it at pleasure;

(d) May make contracts;

(e) May acquire, hold, and dispose of property;

(f) May appoint, fix the compensation of, and remove such officers, employees, attorneys, and agents as are necessary for the transaction of the business of the corporation; define their duties, and require bonds of them, and fix the penalties thereof;

(g) May incur obligations, borrow money for temporary purposes, and issue notes or other evidence of indebtedness therefor, but the aggregate amount of the indebtedness at any time shall not exceed 25 per centum of the value of the assets at such time;

(h) May exercise any of the functions vested in the Secretary of War by sections 201 and 500 of the Transportation Act, 1920, as amended;

(i) May, in the exercise of such functions, conduct the business of a common carrier by water, and maintain, manage, and operate properties held for or used in the service of transportation, or necessary or convenient to such use; and

(j) In addition to the powers specifically granted, shall have such powers as may be necessary or incidental to fulfill the purposes of its creation.

SEC. 6. (a) The Secretary of War shall transfer to the corporation all assets transferred to, or acquired, constructed, or operated by, or under the direction of, the Secretary of War, or which revert to the United States, under section 201 of the Transportation Act, 1920, as amended, or under the joint resolution entitled "Joint resolution to exempt the New York State Barge Canal from the provisions of section 201 of the Transportation Act, 1920, and for other purposes," approved February 27, 1921.

(b) The rights, privileges, and powers, and the duties and liabilities, of the Secretary of War, or the inland and coastwise waterways service, in respect of any contract, loan, lease, account, or other obligation, under section 201 of such Act, or under such joint resolution, shall become the rights, privileges and powers, and the duties and liabilities, respectively, of the corporation.

(c) All money available for expenditure or the making of loans under such joint resolution or section 201 of such Act, and all money repaid in pursuance of loans made under subdivision (c) of section 201 of such Act, shall be avail-

able for expenditure or the making of loans by the Corporation under this Act.

(d) The enforcible claims of or against the Secretary of War, or the Inland and Coastwise Waterways Service, in respect of the operation, construction, or acquisition of any such transportation facilities, shall become the claims of or against, and may be enforced by or against, the corporation.

(e) The Secretary of War shall adjust and appraise the value, at the time of transfer, of all assets transferred to the corporation under this Act, and such value shall be entered upon the books of the corporation.

(f) In the determination of the running of the statute of limitations or of any prescriptive right, the period of time shall be computed in the same manner as though this Act had not been passed.

APPENDIX B.

U. S. Code, Title 49, Sec. 15 (7).

Section 15. (7)*Commission to determine lawfulness new rates; suspension, refunds.*—Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be

proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portions of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after June 18, 1910, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it, and decide the same as speedily as possible.